

BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF WASHINGTON

In the Matter of

THE APPLICATION REGARDING
THE CONVERSION AND
ACQUISITION OF CONTROL OF
PREMERA BLUE CROSS AND ITS
AFFILIATES

No. G02-45

OIC STAFF'S OBJECTIONS TO
PREMERA'S PROPOSED
REDACTIONS TO THE
CONSULTANT'S REPORTS

INTRODUCTION

The OIC Staff retained the expert services of a variety of consultants (i.e., investment banking, actuarial, accounting, tax, legal and antitrust economics) to assist in evaluating Premera Blue Cross and its Affiliate's ("Premera") proposed conversion from non-profit to for-profit status consistent with the standards of review set forth in chapters 48.31B and 48.31C RCW. The retained consultants provided draft and final reports documenting their findings. These draft and final reports were provided to Premera for review and to propose redactions to specific areas of text that it determined was proprietary. Premera provided its proposed redactions of the final reports to the OIC Staff and Intervenors.

The OIC Staff, in conjunction with the retained consultants, reviewed each proposed redaction and objects to a significant amount. The goal of the OIC staff is to provide the parties and the public with sufficient information to permit meaningful participation in this proceeding, while protecting Premera's truly confidential and proprietary information. But, Premera's proposed redactions go too far. In some cases, Premera has redacted over 80 percent of the report. The consultants' reports will only serve the purpose of the

Commissioner and be useful to the public insofar as the majority of their findings are disclosed. For these reasons, the OIC Staff requests Judge Finkle rule on these objections/comments and order that the text identified as improperly redacted be fully disclosed to the public.

PREMERA'S PROPOSED REDACTIONS TO THE CONSULTANT'S REPORTS

The Public Disclosure Act ("Act") requires public agencies to make all "public records available for public inspection." RCW 42.17.260(1). The act is to be liberally construed and its exemptions narrowly construed. RCW 42.17.010(11). RCW 42.17.020 states in pertinent part that a public record, "includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." The OIC Staff is subject to the Public Disclosure Act. The reports developed by the consultants fall within the purview of the Act because they constitute a "public record" as defined by the Act.

Premera made proposed redactions to the reports, annotating these redactions as either "proprietary" or "Attorney Eyes Only." Upon request, Premera provided the OIC Staff information regarding the standards they used when determining whether to redact information contained in the reports, however, Premera did not provided specific reasons for each and every proposed redaction. The general standards and statutory grounds that Premera claimed it used were:

1. RCW 42.17.31917, which is a specific exemption under the Public Disclosure Act ("Act") regarding "confidential proprietary and trade secret information provided to

1 the commissioner under RCW 48.31C.020 through 48.31C.050 and 48.31C.070.” The
2 statutes identified in this exemption are part of the Holding Company Act, the
3 governing statute for the Premera Conversion.
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5 2. RCW 42.17.310(1)(h), which exempts from the public, “valuable formulae, designs,
6 drawings, computer source code or object code, and research data obtained by any
7 agency within five years of the request for disclosure when disclosure would produce
8 private gain and public loss.” The purpose of this exemption is to, “prevent private
9 persons from using the Act to appropriate potentially valuable intellectual property for
10 private gain.” *Progressive Animal Welfare Society v. University of Washington*, 125
11 Wash.2d 243, 884 P.2d 592 (1995). In essence, the Act protects “recently acquired
12 intellectual property for being converted to private gain.” *Id* at 255.
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14 3. RCW 42.17.260(1), which incorporates other statutory exemptions that would
15 exempt or prohibit disclosure of specific information or records. However, “in the
16 event of a conflict between the Act and other statutes, the provisions of the Act
17 governs.” RCW 42.17.920
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19 4. RCW 19.108.010 *et seq.*, the Uniform Trade Secrets Act (“UTSA”), which qualifies
20 as an “other statute” under the Act. The UTSA defines a trade secret as:
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22 information, including a formulas, pattern, compilation, program device, method,
23 technique or process that:

24 (a) Derives independent economic value, actual or potential, from not being generally
25 known to, and not being readily ascertainable by proper means by, other persons who
26 can obtain economic value from its disclosure or use; and

1 (b) Is the subject of efforts that are reasonable under the circumstances to maintain its
2 secrecy.

3 5. RCW 48.31C.130, a part of the Holding Company Act that exempts confidential
4 proprietary and trade secret information provided to the commissioner under RCW
5 48.31C.020 through 48.31C.050 and 48.31C.070 are from public inspection and
6 copying.

7 The OIC staff reviewed each redaction proposed by Premera to determine whether the
8 proposed redaction fell within the exemptions to the Act listed above. In many cases, the
9 proposed redacted text is not covered by one of the exemptions, and should therefore be
10 disclosed. For example, where the source of the information was available through other
11 public means, i.e., from Premera's own website or from third parties, the OIC Staff has
12 objected to the redaction. Premera cannot establish that "a trade secret exists if the information
13 is generally known to or readily ascertainable by other persons who can obtain economic value
14 from its disclosure or use." *Precision Moulding & Frame v. Simpson Door Company*, 77
15 Wash.App. 20, 888 P.2d 1239 (1995).
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18 The OIC objects to proposed redacted text when the material is a conclusion made by
19 the consultant rather than factual information. The conclusion cannot be construed as
20 proprietary, as the conclusion is based upon the consultant's thought process and a different
21 consultant looking at the same data may develop a different conclusion. While the underlying
22 factual material used to make the conclusion may not be disclosed verbatim, the conclusion
23 drawn by the consultant should be disclosed. Furthermore, the OIC Staff objects to redacting
24 material that is unlikely to cause Premera economic or competitive harm. Unless Premera can
25 specify how this material would cause such harm, the material should be disclosed.
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RELIEF REQUESTED

The OIC Staff has provided the Special Master the final reports with the proposed redactions and the Staff's list of comments/objections to each redaction, by report. The OIC Staff requests that the Special Master order that the text identified as improperly redacted be fully disclosed to the public.

RESPECTFULLY SUBMITTED this 3rd day of November, 2003.

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